87-1954

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NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1987

THE CONSOLIDATED CITY
OF JACKSONVILLE,
DUVAL COUNTY, FLORIDA,
a municipal corporation,

Petitioner,

vs.

WINSTON NASH,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's imposition of a burden of persuasion upon the employer, in a Title VII "disparate impact" case, conflicts with the proper burden of production standard set forth by the Third Circuit in *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3rd Cir. 1981)?

2. Whether the Eleventh Circuit violated the clearly erroneous standard set forth in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), when it substituted and imposed its findings regarding the job-relatedness issue in this case?

3. Whether the Eleventh Circuit erred when it limited the type of evidence it considered to be legally sufficient to prove job-relatedness?

4. Whether the Eleventh Circuit usurped the remedial responsibility of the Trial Court by unilaterally fashioning a remedy in this disparate "impact" case?

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OPINIONS BELOW

The Eleventh Circuit Order denying rehearing and suggestion of rehearing in banc (Appendix-53).*

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*hereinafter Appendix referred to as (A-).

Two separate opinions of the Eleventh Circuit are reported at *Nash v. Consol. City of Jacksonville, Duval County*, 763 F.2d 1393 (11th Cir. 1985) (*Nash I*)(A-3) and *Nash v. Consol. City of Jacksonville, Duval County*, 837 F.2d 1534 (11th Cir. 1988)(*Nash II*)(A-38).

The Opinion and Order of the District Court which has not been officially reported (A-17).

JURISDICTION

i) The Judgment of the Eleventh Circuit was entered February 25, 1988.

ii) The Order denying rehearing and suggestion of rehearing in banc was entered March 29, 1988.

iii) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and Rule 17.1 of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

42 U.S.C.A., Section 2000, *et seq.*

29 C.F.R. 1607, *et seq.*

STATEMENT OF CASE

In 1981, Winston Nash (Nash), a black male, failed a promotional examination to be a firefighter lieutenant with the City of Jacksonville (City). The examination had a disparate impact against blacks.

On March 14, 1983, Nash filed his Complaint, which arose under Title VII of the Civil Rights Act of 1964, as amended, alleging race discrimination in promotions under a disparate impact theory of recovery. In November of 1983, a Protective Order denying Nash production of the examination was granted after timely opposition to the motion was not filed (A-58,55). The trial commenced on February 14, 1984 and was concluded on February 28, 1984. The City established at trial that (1) the test questions were prepared according to guidelines relating to content validity and (2) that the test questions related to functions actually performed on the job. Most significantly, Nash acknowledged at trial that the test questions were job related. On June 26, 1984, Opinion and Judgment for the City was

entered by the United States District Court for the Middle District of Florida (Trial Court). Nash appealed the Final Judgment to the Court of Appeals for the Eleventh Circuit .

On June 25, 1985, the Eleventh Circuit reversed the Trial Court's decision, *Nash I*, stating that the Court appeared to apply law controlling in disparate treatment cases when the decision turned on disparate impact. The case was remanded for the purpose of allowing the Trial Court to render fact findings in accordance with the Eleventh Circuit's opinion.

Neither party sought a trial de novo and on July 10, 1986, Nash and City filed proposed findings of fact and conclusions of law (A-60,62,65). The Trial Court again entered judgment for the City. Nash again appealed to the Eleventh Circuit.

On February 25, 1988, the Eleventh Circuit reversed, *Nash II*, and remanded with instructions to the Trial Court that Nash was entitled to the lieutenant's position together with seniority and

benefits as of the date the first lieutenant was selected for promotion from the eligibility list of the examination and for a determination of the amount of back pay.

The City filed a Petition for Rehearing and Suggestion of Rehearing In Banc to the Eleventh Circuit. On March 29, 1988, the Eleventh Circuit denied the request.

The City now petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, in the Supreme Court of the United States, on the grounds, *inter alia*, the Eleventh Circuit has rendered a decision which required an improper standard of proof for a disparate impact case, in direct conflict with the holdings of the Third Circuit, and in conflict with the decisions of this Honorable Court. Further, the Eleventh Circuit's reevaluation of the evidence was patently violative of this Court's clearly erroneous standard.

REASONS FOR GRANTING CERTIORARI

I

THE ELEVENTH CIRCUIT'S IMPOSITION OF A BURDEN OF PERSUASION UPON THE EMPLOYER CONFLICTS WITH THE BURDEN OF PRODUCTION STANDARD SET FORTH BY THE THIRD CIRCUIT.

The first issue before this Court is the same issue upon which this Court granted Certiorari in *Western Air Lines, Inc. v. Criswell*, 469 U.S. 815 (1984); to wit: whether the employer had a burden to prove the validity of a facially neutral employment policy. This Court did not resolve that question on the merits because upon review of the facts, this Court held that such a burden was in fact placed upon the plaintiff at trial. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 at 408 n. 10 (1985). This significant question has yet to be resolved by the Supreme Court. The Circuit Courts remain divided over whether the burden of persuasion or merely a burden of production shifts to the employer. See 45B Am. Jur. 2d, Job Discrimination, Section 2001.

As will be demonstrated in this Petition, and as the Eleventh Circuit stated in *Nash I*, 763 F.2d at 1397, this question is a "momentous one" in determining the outcome of any case.

In the case at bar, the Eleventh Circuit Court has twice concluded that the Trial Court failed to place a burden of persuasion on the defendant City. The first time on appeal, Nash argued that the Trial Court erred by merely requiring the City to articulate some legitimate nondiscriminatory reason for its actions in this impact case.

The Eleventh Circuit agreed with Nash and stated, at 1397-1398:

> "... this is not the rule of the above cases, or any others, in an 'impact' situation involving employment tests under Title VII. It is the rule in intent cases only. The Court in *Burdine*, 450 U.S. at 252 n. 5, 101 S.Ct. at 1093 at n. 5, expressly distinguishes the 'impact' situation. In an 'impact' case the employer must do more than 'articulate'. He bears the burden of proving or 'persuasion', that the examination was a 'business necessity'." (citations omitted)

* * *

> "Where, as here, there exist glaring weaknesses in the cases of both sides, the difference between a burden of 'articulation' and of 'persuasion' may be a *momentous one*, and it is not just a question of who goes forward, which may cease to be important when all the testimony is in." (*emphasis added*)
>
> * * *
>
> "It is true that defendant, in its testimony, went much beyond mere 'articulation,' and the court recited this testimony with every indication of believing it, yet the court at 180-181 repeatedly states that plaintiff has failed to persuade the court 'by a preponderance of the evidence'. The idea seems to be that mere 'articulation' shifts the burden back to plaintiff to persuade that the test is discriminatory, but this is contrary to the authorities in this circuit as to 'impact' employment test cases that we have cited."

A year after remand, Nash requested that the Trial Court issue new findings and conclusions and the City consented. Neither party requested a trial de novo. Further arguments were received from the parties. The Trial Court found that the examination was job-related, the City did not discriminate, and judgment was entered for the City. The second time on appeal, the Eleventh Circuit complained that the

Trial Court, on remand, had committed the same error. The Eleventh Circuit again reversed, finding for Nash and against the City, holding the ultimate burden of persuading the Trial Court that the examination was not discriminatory shifted to the City after the showing of disparate impact was made. *Nash II*, 837 F.2d at 1537.

In *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3rd Cir. 1981), the Third Circuit emphatically held to the contrary. The Third Circuit concluded that an employer's burden is the same in disparate treatment and disparate impact cases. Further, the Third Circuit, applying numerous Supreme Court cases, stressed that there was no indication of a requirement for shifting the burden of persuasion at any stage of the trial proceeding. The only difference in the two types of discrimination cases is in the nature of the evidence necessary to establish them.

The Eleventh Circuit holds that in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981),

the Supreme Court specifically distinguished the burdens of proof or persuasion imposed upon the parties in the two types of Title VII actions. *Nash I*, 763 F.2d at 1397. In *Burdine*, 450 U.S. at 252 n. 5, this Honorable Court stated:

> "We have recognized that the factual issues, and therefore the character of the *evidence* presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." (citations omitted)(*emphasis added*)

The Eleventh Circuit, as well as other Circuits, have misconstrued this comment. These Circuits have drawn the erroneous inference that the implication of the footnote was to differentiate the burden of persuasion in the disparate impact context from the disparate treatment cause of action. The plain language of the reference clearly indicates that the Supreme Court was speaking about the different facts (evidence) required to establish the different types of discrimination models. The misinterpretation of these words by the Eleventh Circuit has imposed an unnecessary and unfair

burden on employers to prove the absence of the ultimate fact at issue, discrimination. Specifically, once a discriminatory impact is found, the Eleventh Circuit has erroneously shifted the burden of persuasion and required the employer to prove that the employer has not discriminated, i.e. its examination is job related.

The Supreme Court has held that the burden of persuasion should always remain on the employee/plaintiff to prove discrimination by the employer. *Connecticut v. Teal*, 457 U.S. 440 (1982); *Texas Department of Community Affairs v Burdine, supra*; *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Teamsters v. United States*, 431 U.S. 324 (1977); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

When a prima facie Title VII "treatment" case is made, the employer must come forward with

evidence (burden of production) of a legitimate nondiscriminatory reason for its action. Thereafter, the plaintiff may establish discrimination by proving the stated reason is a pretext for illegal discrimination. The employee's burden of persuasion never shifts. The ultimate burden of persuasion always remains with the employee on the issue of illegal discrimination.

As the Third Circuit has properly held, this same test is applicable for "impact" cases though the character of the evidence is altered.

The Third Circuit reasoned that an application, as advanced by the Eleventh Circuit, of a shifting burden of persuasion in the different discrimination cases would lead to unnecessary confusion, unjust and unfair results. The Third Circuit concluded in *NAACP v. Medical Center, Inc.*, 657 F.2d at 1335:

> "Moreover, it is illogical to impose a heavier burden on a defendant in a case where a neutral policy results in disparate impact than in one where the charge is unlawful animus. Indeed, if there is to be a difference, quite the opposite result should follow. The defendant who

> intentionally discriminates should not fare better than the one whose conduct may be subjectively blameless, but because of its effects may require remedial action."

The correct standard requires the employer to produce evidence of job-relatedness (the articulation) and then requires the employee to prove pretext by proving either the lack of job-relatedness or the availability of alternative selection devices which will produce less "impact".

The Eleventh Circuit in *Nash I* held that the City exceeded its burden of production. If the Eleventh Circuit had applied the proper burden of persuasion, the City would have prevailed on appeal in *Nash I* and *II*.

The decision below should be vacated and the case remanded for entry of the Trial Court's Judgment.

II

THE ELEVENTH CIRCUIT VIOLATED THE CLEARLY ERRONEOUS STANDARD WHEN IT SUBSTITUTED AND IMPOSED ITS FINDINGS REGARDING JOB RELATEDNESS.

On remand, the Trial Court found that the City successfully carried the burden of persuasion imposed in *Nash I* by proving that the City's examination was job-related. The Eleventh Circuit in *Nash II* surprisingly rejected the legal sufficiency of the evidence, which was the identical evidence as in *Nash I*. Significantly, in *Nash I*, the Eleventh Circuit found at 763 F.2d at 1397 that the City "went much beyond mere 'articulation'" on this issue.[1] In *Nash II*, however, the Eleventh Circuit reweighed the evidence, concluded that the City failed to prove job-relatedness, and substituted its judgment for that of the Trial Court.

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1. This was a favorable finding of the majority. It can be inferred from Judge Fay's specially concurring opinion that he believed that the Trial Court's factual and legal conclusions were correct. 763 F. 2d at 1399.

The Supreme Court has established the standard by which an appellate court should review the record of a trial court. A finding of discrimination and determinations of job-relatedness are ultimate facts which are subject to full review by a court of appeal. A court of appeal, however, is bound to the subsidiary facts as found by the trial court unless the appellate court establishes that such factual findings are clearly erroneous. In *Anderson v. Bessemer City*, 470 U.S. 564 at 573-574 (1985), this Court more fully explained:

> "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' (citation omitted) If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact,

> it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. (citations omitted) This is so even when the district court's findings do not rest on credibility determinations, but are *based instead on* physical or documentary evidence or *inferences from other facts.*" (*emphasis added*)

The Trial Court, crediting the evidence presented by the City and discrediting the testimony of Nash's experts concluded that the City met its burden regarding job-relatedness. The Trial Court made its finding of job-relatedness after a careful examination of the methodology used to construct the examination.

This Court in *Washington v. Davis*, 426 U.S. 229 (1976) recognized that there is no single method for validating employment tests. *Id.* 247 n. 13. Three specific methods have been established by the Equal Employment Opportunity Commission (EEOC) guidelines and have been accepted by this Court. These three methods include criteria validity, constructive validity and content validity.

In the case at bar, the Trial Court found that the City properly met its burden by validating the promotional examination through "content" analysis. The Trial Court made numerous findings of fact which supported its conclusion that the test was job-related. Substantial evidence supported the Trial Court's decision including Nash's admissions that the test questions were job-related and proof that the procedures used to create the fire lieutenant's exam paralleled the content validation process defined by Nash's expert and the EEOC (A-66-69; 70-77).

After weighing the above evidence, the Trial Court found:

> "After carefully considering the evidence, this Court must determine whether the 1981 examination administered for fire lieutenant (combat) was job-related. First, Defendant engaged in a lengthy, meticulous method of constructing the exam. The job functions required of a fire lieutenant (combat) were developed by individuals who not only had served in the position of fire lieutenant (combat) in the past, but also were now responsible for seeing that those who were, at present, fire lieutenant (combat) performed their jobs effectively. The make-up

committee was composed of individuals intimately familiar with the work behaviors and knowledges necessary for the position of fire lieutenant (combat). *Additionally, the questions were drawn to test those functions, or knowledges*, from materials used to train fire lieutenants (combat).

"Evidence that the examination was not job-related was noticeably lacking. Plaintiff's expert never correlated the test with successful job performance, but rather correlated the pass-fail rate of whites to blacks. This correlation certainly was evidence of the disproportionate impact of the examination, but was not evidence that rebutted Defendant's contention that the test was job-related. *The test was developed by experts in the field from available materials directly related to job performance and to the knowledge required.* Neither its administration , nor action taken upon the results, was designed, intended, or used to discriminate on the basis of race." (*emphasis added*) (A-32-33)

The Trial Court compared the process by which the City created its combat fire lieutenant's exam to the process described by the EEOC and found that the City followed said process and created a job-related examination. Nash confirmed that the actual questions were job-related.

The Eleventh Circuit had before it competent substantial evidence to support the Trial Court's conclusions, but it found otherwise and substituted its own judgment for that of the Trial Court in violation of the Supreme Court's determination in *Anderson*. A legal conclusion that the Eleventh Circuit reweighed the evidence is inescapable when the Eleventh Circuit's own language is considered:

> "The *best evidence* on job-relatedness of the questions came from the testimony of appellant's expert, who testified that from his statistical analysis of the test results and his study of the materials he received from the City, the test was 'not capable of being validated, because there's too many items that cannot be validated.'" (*emphasis added*) *Nash II*, 837 F.2d at 1538.

> "*Just because* test questions are drafted by qualified city employees does not mean that questions are job-related" (*emphasis added*) *Nash II*, 837 F.2d at 1538.

(The court ignores the fact that both experts determined the test questions were drafted according to the guidelines set out in 29 C.F.R. pt. 1607.) (A-70-77)

> "In any event, *we believe* that an analysis of the job-relatedness of the City's test conducted by the City itself was not legally sufficient to carry the City's burden" (*emphasis added*) *Nash II*, 837 F.2d at 1538 n. 6.

(This determination is nothing more than a *de novo* determination disapproved in *Anderson*.)

The Eleventh Circuit clearly reweighed the evidence and ignored the Trial Court's findings.[2] By reweighing the evidence, the Eleventh Circuit even went so far as to disregard its *Nash I* finding that the City had satisfied its burden of production.

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2 The fact that the examination itself was never introduced into evidence was problematic to the Eleventh Circuit. In *Nash II*, the Court repeated its *Nash I* concerns by suggesting that if the Trial Court had shifted the burden of persuasion to the City, "we think defendant might have felt it incumbent to produce the examination questions." *Nash II*, 837 F.2d at 1536.

There is no legal requirement for the City to enter the examination into evidence. Nash had admitted that the examination questions were related to the functions performed by combat firefighters. Therefore, upon remand, the City found it unnecessary to use the exhibit. In *Nash I*, Nash was denied disclosure of the exhibit only after he failed to properly respond to a Motion for Protective Order late in the discovery process (A-58,55). Given an opportunity to bring the examination into evidence at a *de novo* trial after *Nash I*, Nash declined (A-60).

The Eleventh Circuit thereby violated this Court's clearly erroneous standard by undertaking a de novo review of the evidence.

The decision below should be vacated and the case remanded for entry of the Trial Court's Judgment.

III

THE ELEVENTH CIRCUIT ERRED WHEN IT LIMITED THE TYPE OF EVIDENCE IT CONSIDERED TO BE LEGALLY SUFFICIENT TO PROVE JOB RELATEDNESS.

The Eleventh Circuit concluded that the evidence introduced at trial which included the exam formation methodology and Nash's admissions of job-relatedness, were legally insufficient to support the Trial Court's finding of job-relatedness.

The Eleventh Circuit held, in *Nash II*:

> "Job-relatedness can be established through the testimony of *expert witnesses supported by a validation study.* (citations omitted) In this case, however, there was no validation study conducted by an expert. *Without the test itself* and with *no testimony presented by the defendant regarding job relatedness of the questions*, there was *no way* for the district court to conclude that the questions were job related." (*emphasis added*). 837 F.2d at 1537, 1538.

In *Teamsters v United States*, 431 U.S. 324 (1977), the Supreme Court illustrated specific examples of evidence used in defeating a

discriminatory pattern or practice case and also held that the examples were not exhaustive:

> "The employer's defense must, of course, be designed to meet the prima facie case of the Government. *We do not mean to suggest that there are any particular limits on the type of evidence an employer may use.* . . . In such cases the employer's burden is to provide a nondiscriminatory explanation for the apparently discriminatory result." 431 U.S. at 360 n. 46 (*emphasis added*).

Similarly, in *Washington v. Davis*, 426 U.S. 229, at 247, n.13 (1976), the Supreme Court said, "It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance."

The Eleventh Circuit held in *Nash II* that the City failed to satisfy its burden by not offering testimony of a qualified expert to explain the job-relatedness of the questions. This is contrary to the above precedent. The findings of the Trial Court indicate that City employees testified, as qualified experts in their fields, to the job-relatedness of the test. Significantly, Nash conceded the job-

relatedness of the questions. By rejecting the admissible evidence offered by the City, the Eleventh Circuit is interfering with an employer's ability to present a substantive defense to a discrimination suit by limiting the type of evidence an employer may use. The inference derived is that only outside expert testimony will be sufficient to rebut a discriminatory impact prima facie case.

The decision below should be vacated and the case remanded for entry of the Trial Court's Judgment.

IV

THE ELEVENTH CIRCUIT USURPED THE REMEDIAL RESPONSIBILITY OF THE TRIAL COURT BY UNILATERALLY FASHIONING A REMEDY IN THIS CASE.

The Eleventh Circuit, in *Nash II*, remanded the case to the Trial Court with specific instructions to promote the plaintiff without making a finding that he was qualified for the highly skilled firefighter lieutenant position.[3] In *Teamsters*, 431 U.S. at 376, this Honorable Court reasoned that the fashioning of the remedial relief "is best left, in the first instance, to the sound equitable discretion of the trial court." This Honorable Court, in *Albemarle*, 422 U.S. at 415-416, also concluded:

> "The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and -- owing to the structure of the federal judiciary -- these choices are, of course, left in the first instance to the district

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[3] Nash twice failed lieutenant examinations yet was promoted by the Eleventh Circuit over more qualified blacks and whites.

> courts. However, such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' *U.S. v. Burr*, 25 F Cas 30, 35 (CC Va 1807) (Marshall, C.J.)."

In the case at bar, the Eleventh Circuit usurped the well established remedial power of the Trial Court. The Trial Court should be afforded the opportunity to balance the equities of the parties in determining the proper remedy.

CONCLUSION

For all the above and foregoing reasons, Petitioner prays that this Court grant a Petition for a Writ of Certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in *Nash v. Consolidated City of Jacksonville, supra*.

Respectfully submitted,

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Consolidated City of Jacksonville, Duval County, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to WINSTON NASH, Respondent herein, 7948 Jeff Drive, Jacksonville, FL 32244, by United States mail, this 26th day of May, 1988.

Attorney

NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

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THE CONSOLIDATED CITY
OF JACKSONVILLE,
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Winston NASH, Plaintiff-Appellant,

v.

The CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, etc., Defendant-Appellee.

No. 84-3502.

United States Court of Appeals,
Eleventh Circuit.

June 25, 1985.

Deitra Micks, Jacksonville, Fla., for plaintiff-appellant.

William L. Allen, Thomas E. Crowder, Steven E. Rohan, Jacksonville, Fla., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY and HENDERSON, Circuit Judges, and NICHOLS *, Senior Circuit Judge.

NICHOLS, Senior Circuit Judge:

This appeal arises from the claims of a fireman, Winston Nash, as an individual, that the City of Jacksonville (City or Jacksonville) discriminated against him by fail-

* Honorable Philip Nichols, Jr., U.S. Circuit Judge for the Federal Circuit, sitting by designation.

ng to promote him to Fire Lieutenant (lieutenant) in the Combat Division because he did not pass a 1981 promotion examination. The United States District Court for the Middle District of Florida held that Nash did not prove discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, under the "disparate impact" theory, even though it can be unintentional on the employer's part. (Nash also alleged claims under 42 U.S.C. §§ 1981 and 1983, but the court held that any recovery under these laws would require discriminatory intent which had not been shown. Nash has not appealed the decision on these issues.)

This court has jurisdiction under 28 U.S.C. § 1291. We conclude that the district court's ultimate finding, that discrimination was not established, is clearly erroneous being based on a mistake of law, and we remand for further consideration.

I

District Court Proceedings

As established at trial, the facts are as follows: Winston Nash, a black fire engineer employed by the City of Jacksonville since November 1972, has applied for promotion to the position of lieutenant three times. A written examination is used by the Fire Department for promotion to lieutenant; Nash scored an 84 on the examination in 1976, a 69 in 1978, and a 69.072 in

1981. The Civil Service Board has set an automatic cut-off score of 70 for all employment examinations given by Jacksonville. Thus Nash was placed on the promotion eligibility list of the 1976 examination only. Those who had attained the eligibility list were then ranked based on a composite score which is the sum of the test score and seniority points. Nash was not promoted after the 1976 test since he did not place high enough on the list to be selected prior to the list's supersession.

Evidence was adduced at trial regarding discrimination at the Fire Department and the manner in which the 1981 test was prepared. It was established that there have been no blacks in the positions of lieutenant or above in the Combat Division. The trial judge found that only three of the 20 blacks who had taken the test had passed, while 57 of the 100 participating whites had passed. None of the three blacks placed on the list were actually promoted to the 19 vacancies which were ultimately filled; the blacks were not high enough on the list to be placed. Under the four-fifths rule, which states that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (⅘) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by Federal enforcement agencies as evidence of adverse impact," 29 C.F.R. § 1607.4(D) (EEOC guidelines), as well as statistical evidence produced by Nash's ex-

pert witness, the court found that a case of prima facie discriminatory impact had been stated. The court then considered evidence that there was a legitimate justification for the discriminatory effect. Turning to whether the test was content-valid, and thus job-related, the court found that Jacksonville's preparation of the test was acceptable. The test was prepared under the supervision of a personnel examiner who had been employed by Jacksonville for approximately 7 years and who was familiar with the EEOC guidelines. The examiner, Ms. Horne, testified that the test measured knowledge based upon work behaviors. Ms. Horne explained that a committee was formed to prepare the examination, which was composed of two chiefs and one captain. Ideally a lieutenant would have been included in the committee, but none were available; however, the committee members had all once been lieutenants. The court found that each of those in the committee did possess knowledge regarding the lieutenant position.

The committee developed questions for the examination by listing work behaviors and knowledge they deemed necessary for the position; the behaviors were then compared to the job specification for the lieutenant position to determine if the specification was up-to-date. The behaviors were analyzed to determine which knowledges were necessary for a particular behavior and questions were developed to test those

areas of knowledge. The committee composed the questions using the fire manuals and the study materials. Although the committee noted that supervisory ability was necessary for the position, no questions in this area were prepared since the committee felt that supervision could not be tested by a written examination. As questions were prepared, each committee member rated each potential question as to the importance of the tested knowledge to the job. After the final questions were selected based on their job-relatedness, the examiner reworded the questions so they would be simply stated and grammatically correct. Evidence was also produced, through Nash's testimony, that the questions were aimed at job-relatedness but, at least in Nash's opinion, missed the point because they were poorly constructed.

The court determined that the testimony of Dr. Shapiro, Nash's expert, did not bear on the issue of job-relatedness. That expert correlated the pass-fail rate of whites versus blacks, and analyzed the pattern of participants' answers as a whole. The expert concluded that the test was a poor one as some of the questions showed a disparate impact. The expert also found it particularly revealing that some questions were correctly answered by almost all, and some questions were predominantly answered correctly by those who scored poorly on the test as a whole. Thus, the expert concluded the test could not be job-related because

it did not actually test anything. The court considered the expert's testimony and found it probative evidence of the disproportionate impact of the test, but not relevant to job-relatedness because the expert had not seen the examination and had never correlated the test with successful job performance. The questions asked, or samples thereof, were not in the record. While Jacksonville did not produce direct evidence that the test scores correlated with successful job performance, several witnesses stated that it was their belief, based on their experience supervising and their experience composing the test, that there was a correlation. The method of test preparation was also indirect evidence of job-relatedness. (The City does have a probationary period for those promoted; during this time the Fire Department checks to see that those promoted are performing well. The Fire Department appears satisfied with the performance of those promoted. It has not, however, determined directly whether those not promoted could have performed.)

While not specifically discussed by the trial judge in his opinion, the City also produced evidence to rebut the expert's conclusions. A former personnel examiner for the City, whose duties had included reviewing the computer-produced statistical data from the 1981 test, testified that the statistics produced might not accurately reflect nonjob-relatedness because they were formulated based on a sample size of only

twenty, the twenty blacks who participated in the test. The employee testified that the statistics might be useful to flag questions with possible problems, but consideration of the questions was necessary to determine if they were nonjob-related. Mr. Rodeheaver, the employee, testified that he reviewed Nash's answers and found the answers indicated that Nash's mistakes were generally in specific areas of knowledge. (For example, Nash did well on questions pertaining to water distribution and radio signals, but poorly on questions pertaining to first aid.) Mr. Rodeheaver also testified that many of the questions Nash missed were ones which did not show any adverse impact, and that Nash, like the majority of the participants, often chose a commonly selected wrong answer. Mr. Rodeheaver also testified that there was a quirk in the statistical methodology of Nash's expert.

The court concluded that the City had shown that the test was content valid and therefore job-related and then found that Nash had not shown there were less discriminatory ways to meet the City's business necessity. The court considered the alternatives that Nash had suggested during his case-in-chief and found that they would afford the City with a greater opportunity to discriminate than present with the test. The trial judge concluded that ultimately Nash had not proven by a preponderance of the evidence that the City had discriminated against him.

II

Discussion

[1, 2] The finding on discrimination is one of ultimate fact, and this court will reverse the finding only if it is clearly erroneous, or if reversible error occurred in applying the law. In this case, consideration of the court's subsidiary findings is made somewhat more difficult as the trial judge applied some case law developed for disparate treatment cases in analyzing his disparate impact problems. Thus the legal analyses of these theories are intermingled. Still, when a trial has taken place and the parties have had the full opportunity to provide their evidence and arguments, this court will not reverse for harmless errors and will review the ultimate question of discrimination vel non. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). All in all, we think that even so, a remand is necessary so the judge may render fact findings so stated that they are not infected by incorrect assumptions as to law.

[3] Appellant states that he has a claim both under the "disparate impact" and the "disparate treatment" standards. The former test, under Title VII, does not require a specific intent to discriminate and therefore is easier to apply and more appropriate when, as here, the employer has a

facially neutral method of selection which, as applied, has a discriminatory "impact." *Connecticut v. Teal*, 457 U.S. 440, 446, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982). The latter test, when under Title VII, may be more appropriate when specific intent to discriminate is shown either directly or by inference. In reality, as we view the case, the only showing of intent is the inference that people intend the inevitable consequences of their acts, *i.e.*, that in using a method of selection that was invariably fatal to black candidacies, appellee must have intended no black to succeed. In the circumstances of this case, such an inference could be drawn only if the "disparate impact" was too obvious to be overlooked, and in that event, inquiry into intent would be superfluous. Appellant therefore rightly states that "impact" is the principal issue, and we regard it as being for practical purposes the only one. The court, in any event, made a specific finding as to "intent" only under the §§ 1981 and 1983 claims which are not before us.

[4] Appellant attacks the holding below on the ground that the court stated (R. 170) that in an "impact" case the employer need only "articulate some legitimate, non-discriminatory reason for its actions," citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). But this is not the rule

of the above cases, or any others, in an "impact" situation involving employment tests under Title VII. It is the rule in intent cases only. The Court in *Burdine*, 450 U.S. at 252 n. 5, 101 S.Ct. at 1093 at n. 5, expressly distinguishes the "impact" situation. In an "impact" case the employer must do more than "articulate." He bears the burden of proving or "persuasion," that the examination was a "business necessity." *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Walker v. Jefferson County Home*, 726 F.2d 1554, 1558 (11th Cir.1984); *Jackson v. Seaboard Coast Line Railroad Co.*, 678 F.2d 992 (11th Cir.1982).

[5] Where, as here, there exist glaring weaknesses in the cases of both sides, the difference between a burden of "articulation" and of "persuasion" may be a momentous one, and it is not just a question of who goes forward, which may cease to be important when all the testimony is in. The observations of the trial court repeatedly in its opinion indicate that the defendant need only say something: "if he simply explains what he has done" (R. 179). It is also said in the same breath that defendant "successfully refuted plaintiff's prima facie case by showing the test was valid," but in context this may only mean that an "articulation" sufficed to make a successful refutation. The court says (R. 179), plaintiff at all times retains the burden of persuasion. It is true that defendant, in its testimony, went much beyond

mere "articulation," and the court recited this testimony with every indication of believing it, yet the court at 180–181 repeatedly states that plaintiff has failed to persuade the court "by a preponderance of the evidence." The idea seems to be that mere "articulation" shifts the burden back to plaintiff to persuade that the test is discriminatory, but this is contrary to the authorities in this circuit as to "impact" employment test cases that we have cited.

Had the court made numbered separate findings of fact and conclusions of law, we might not be in such perplexity. The discursive mode it adopted, while permissible under the rules, leaves the reader frequently in the dark as to the legal assumptions that may underlie any particular fact assertion. We have considered whether we could hold that the "articulation" assertions were harmless error because they could be severed from the most relevant fact findings. We conclude that this mode of rescuing the decision below is not available.

We further express wonder that any court should attempt to determine whether a written examination was "job-related" and "content-valid" without having before it the questions asked of the applicants. The court, though accepting as true the testimony of Dr. Shapiro, plaintiff's expert, as to discriminatory "impact," rejected it as to "content-validity," in part because Shapiro too had not seen the examination. It

would indeed seem that it is equally as hopeless for an expert to try to form an opinion in such a matter, without this necessary aid, as it is for the judge to adjudicate. Had the burden of persuasion as to "content-validity" been placed where it should have been, on defendant, we think defendant might have felt it incumbent to produce the examination questions. They were successfully withheld from discovery on the ground of secrecy, in rulings not before us for review, but we hope that upon our remand, the questions will somehow find their way before the court.

Appellant finally says that the finding that Nash has failed to sustain his burden under Title VII is clearly erroneous where the district court was already predisposed against "these kinds of cases." The repeated use of quotation marks suggests the court actually used these words, but it did not. We read this argument to allege bias against Title VII plaintiffs on the part of the district judge, though this complaint is shrouded in a decent obscurity.

Counsel for appellants generally do better to confine themselves to actual error in the record rather than broad general charges of bias. The suggestion here is, in effect, we should supersede the "clearly erroneous" standard and, in effect, determine that all findings were "clearly erroneous" and retry the case *de novo* on the record. This kind of suggestion is not very helpful, because it lacks support in the

federal rules. It reads like a disgruntled loser cursing the court, as all losers are entitled to do, but on the courthouse steps rather than in appellate briefs. If counsel really and truly believes the trial court is biased, there are measures counsel can and should take, but they were not taken here.

The incident which of record establishes, in counsel's eyes, that the court is biased, not only against Title VII plaintiffs, but against her personally, occurred at a pretrial conference shortly before the actual trial started. She was seeking a continuance for further discovery. The judge denied the continuance and in doing so, was sharply critical of her conduct of this case and other cases. He said she made a practice of filing suit whenever a black person was "discharged or doesn't get a job" without adequate or any investigation of the merits, hoping to establish the facts later and, presumably, dismiss if the facts were insufficient. He thought she should "have a good case before you file the case." In this particular suit she had had anyway five months for discovery after filing and not used them, he said.

This view of the ethical duties of counsel filing a lawsuit is not before us for review and we do not pass judgment upon it. It is, however, an understandable view to be entertained by anyone dismayed at the flood of litigation in the federal courts. It would not reflect the existence of bias or prejudice here unless the judge applied it only to some particular category of plain-

tiffs or attorneys and there is nothing to convince us that he did. He could perhaps have reflected more on the likelihood that what he said would be misunderstood by the target of his disapprobation, and by spectators. He, just as counsel, had his established and proper ways to take action in case he perceived unethical conduct before him, and, he resorted to an open court tongue-lashing, a mode which, justified or not justified, still is adopted at some peril.

Accordingly, we decline the invitation to hold all the fact findings "clearly erroneous" and find in it no basis for disturbing the judgment below, which, however, cannot be sustained for other reasons.

Conclusion

The judgment below is vacated and the cause is remanded for further proceedings in accordance with this opinion.

VACATED AND REMANDED.

FAY, Circuit Judge, concurring specially:

The majority bases its holding upon a conclusion that the trial judge applied the wrong legal test to the plaintiff's "disparate impact" claim. My reading of the trial judge's ruling does not leave me with such an impression. I concur, however, because any reasonable doubt in this regard can and should be eliminated.

Opinion and Final Judgment of the District Court, Filed May 4, 1987

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

vs. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY FLORIDA, etc..

Defendants.

OPINION AND FINAL JUDGMENT

The above-styled cause is before the Court upon remand from the United States Court of Appeals, Eleventh Circuit. The Eleventh Circuit instructed this Court to apply the law controlling the disparate-impact theory of discrimination under Title VII, 42 U.S.C. §2000e et seq. Nash v. Consol. City of Jacksonville, Duval Cty., 763 F.2d 1393 (11th Cir. 1985).

Therefore, this Court ordered both parties to file new proposed findings of fact with citations to the trial transcript, and conclusions of law in accordance with the Eleventh Circuit's decision. The

Defendant filed revised findings of fact and conclusions of law. In lieu of new proposals, however, the Plaintiff merely filed a copy of his appellate brief. On December 15, 1986, the Plaintiff's attorney moved to withdraw. This Court granted said motion, on January 15, 1987 and ordered Plaintiff to obtain the appearance of substitute counsel within thirty days. To date Plaintiff has not complied with this order. Neither party requested a trial de novo or oral argument prior to this Court rendering its decision in compliance with the mandate of the Eleventh Circuit. Accordingly, the Court will proceed on the basis of the trial record and on the parties' submissions.

Plaintiff, WINSTON NASH, is a black male, United States citizen residing in Jacksonville, Duval County, Florida. Defendant, THE CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, is a municipal corporation. Pursuant to the laws of the United States and the State of Florida, Defendant has the power to sue and be sued in its municipal

capacity. It is a "person" under 42 U.S.C. § 1983 and its agents and employees performed all acts complained of under color of law. For the purposes of Title VII, Defendant is an employer. This Court has jurisdiction pursuant to 28 U.S.C. § 1343(3) and (4). Plaintiff additionally seeks declaratory relief pursuant to 28 U.S.C. § 2201 and § 2202.

Plaintiff alleges that Defendant discriminated against him in his employment because of his race. He originally brought the action under Title VII, 42 U.S.C. § 2000e et seq. and under 42 U.S.C. §§ 1981, 1983 and 1988. At trial this Court held that recovery under 42 U.S.C. §§ 1981, 1983 and 1988 was precluded because Plaintiff failed to show discriminatory intent. Such a showing is required under those statutes. Plaintiff did not appeal the decision on these issues and thus, these issues are not before the Court now.

Statement of the Case

Plaintiff has been employed by Defendant in the Department of Public Safety, Fire Division since

November 1972. At present, Plaintiff is employed as a firefighter/engineer. He holds an associate's degree in Fire Science, a bachelor's degree and a master's degree.

On three different occasions Plaintiff attempted to be promoted to the position of fire lieutenant (combat) in the Jacksonville Department of Public Safety, Fire Division by taking the Lieutenant (Combat) Promotion Examination. He first took the examination in 1975 and achieved a score of 84. He was placed on the eligibility list, however, the list expired before he was promoted. Plaintiff took the examination again in 1978 and also in 1981, achieving scores of 69 and 69.072, respectively. Because the cut-off score on the examination is set at 70 by the Civil Service Board, Plaintiff was not eligible for promotion after either the 1978 or the 1981 examination.

Following the 1981 examination, Plaintiff filed a charge of employment discrimination with the Equal Employment Opportunity Commission (the

EEOC). A notice of right to sue was issued from the EEOC and Plaintiff filed suit in this Court. Plaintiff alleged that Defendant denied him promotion to the position of Fire Lieutenant (combat) in the Jacksonville Department of Public Safety, Fire Division because of his race. The complaint prayed that Plaintiff be awarded the desired position, back pay and benefits, appropriate injunctive relief, costs and attorney's fees. A bench trial was held and this Court found that Plaintiff did not sufficiently sustain his burden of persuasion under Title VII. Plaintiff appealed and the Eleventh Circuit vacated and remanded the cause to this Court.

Findings of Fact

The evidence submitted at trial revealed that the Lieutenant (Combat) Promotion Examination administered in 1981 had an adverse impact on blacks. Gladys Darlene Horne, a personnel examiner with Defendant and the person in charge of the creation and administration of the 1981 examination, testified that under the EEOC

guidelines, the 1981 examination was in violation of the four-fifths (4/5) rule, 29 C.F.R. 1607.4(D). Under the four-fifths rule, "a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) or eighty per cent (80%) of the rate for the group with the highest rate will generally be regarded by federal enforcement agencies as evidence of adverse impact . . . ." 29 C.F.R. 1607.4(D).

The results of the 1981 examination were offered at trial. Only three (3) of the twenty (20) blacks who had taken the test for the position of fire lieutenant (combat) passed. Fifty-seven (57) of the one hundred (100) whites taking the same examination passed. To meet the requirements under the four-fifths rule, nine (9) of the twenty (20) blacks taking the examination would have had to pass.

The City presented evidence concerning the construction of the 1981 examination. Following a request from the Fire Division that a test be administered, Defendant's personnel department,

through personnel examiner Gladys Darlene Horne, organized the construction of the examination. Ms. Horne, who had been employed with Defendant as a personnel examiner for approximately seven (7) years, testified that she was familiar with the EEOC guidelines and that the 1981 examination measured knowledge based upon work behaviors.

In developing the test, Ms. Horne assembled a make-up committee which, she testified, would have ideally been composed of one (1) person currently serving in the classification for which the test was being constructed. In this instance, however, no lieutenant was selected for the committee, and Ms. Horne was assigned two (2) chiefs and one (1) captain to assist her in constructing the examination. The evidence showed that each of the persons on the committee had at one time held the position of lieutenant in combat and possessed knowledge regarding the position. Mr. Gary F. Keys, the Chief of Operations for the Jacksonville Fire Department and the individual who selected the

three persons to serve on the make-up committee, testified that he recommended the persons on the make-up committee because they were qualified individuals in terms of their knowledge of training and study material. Mr. Keys explained that their qualifications arose because they had been on the job for some time and also were familiar with testing procedures.

The committee met and came up with a list of work behaviors and work knowledges which they felt were necessary for the position of Fire Lieutenant (Combat). The make-up committee's expertise was used to develop the work behaviors, and the committee drew on their knowledge of what functions a fire lieutenant performed on the job in arriving at the work behaviors. Although none of the individuals on the committee were, at the time the examination was constructed, working in the position of fire lieutenant (combat), each was in a supervisory capacity which enabled him to be

extremely familiar with the job functions of a fire lieutenant in combat.

Once the work behaviors were developed, the behaviors were compared to the job specifications for fire lieutenant to determine if the specification was up to date. The work behaviors then were analyzed to determine which knowledges were necessary for the particular behavior required for the position. After the analysis, potential questions were developed to test the applicant's knowledge.

The committee composed the questions after referring to fire manuals used for training and study materials available to the firefighters. The committee tested only those knowledges it determined could be tested in a written method. Each member of the committee then rated each potential question as to how important the knowledge was to the job. Those questions that the job experts determined were not job-related were discarded. The questions ultimately chosen for the

examination were checked for proper grammatical construction to assure that they properly were testing knowledge rather than testing reading comprehension. Ms. Horne testified that she used her own knowledge, derived from various textbooks and workshops, to word the questions in a grammatically correct manner.

The evidence further disclosed that the exam questions were composed from study materials that were available to the firefighters. The Department provided a list of materials that would be used for the examination. The Plaintiff himself testified that, as far as he knew, the questions came from the study material and that he felt that the material was job-related.

However, the Plaintiff argued that the 1981 Fire Lieutenant (Combat) Examination was not validated in accordance with EEOC guidelines. Specifically, the quidelines delineate standards for validity studies of employment-related tests. Plaintiff's expert, Dr. Martin M. Shapiro, conducted

an extensive study on the material used in order to validate the 1981 examination. Dr. Shapiro's testimony revealed that he conducted an item-by-item study of the test performance of each of the candidates, black and white, who took the examination. Dr. Shapiro, who was familiar with the EEOC guidelines for test validation, reviewed material pertinent to the 1981 Fire Lieutenant (Combat) Examination, including the deposition of Ms. Horne, the reading material on the reading list given candidates for preparation for the examination, a statistical analysis composed by Defendant, and the item-by-item test performance of each of the candidates. Although he did not have a copy of the 1981 examination, Dr. Shapiro testified that from the material he received, he could determine whether the test was content-valid based on a statistical analysis of the answers rendered by each candidate. Dr. Shapiro engaged in an extremely detailed, exacting study of the test results of both blacks and white. In his opinion the test was not

content-valid, and the examination would not necessarily select persons who best performed on the examination, or who would perform best on the job.

Defendant's expert, Robert Rodehaver, also evaluated the test results by reviewing each question missed. Mr. Rodehaver concluded that 70 out of 97 test questions showed no adverse impact.

Conclusions of Law

Plaintiff originally alleged that he had claims under both the disparate-treatment and the disparate-impact standards under Title VII. However, one claiming disparate treatment must show that Defendant had the specific intent to discriminate. After the bench trial, this Court found that Plaintiff was not able to show Defendant's specific intent to discriminate. This finding was not disturbed by the Eleventh Circuit. Nash, 763 F.2d at 1397. Thus, the appropriate issue is whether the disparate impact of the 1981 Lieutenant (Combat) Promotion Examination violated Title VII.

In Walker v. Jefferson County Home, 726 F.2d 1554 (11th Cir.1984), the Eleventh Circuit, citing Connecticut v. Teal, 457 U.S. 440 (1982), Albermarle Paper Co. v. Moody, 422 U. S. 405 (1975),and Griggs v. Duke Power Co., 401 U.S. 424 (1971), recited the appropriate burdens of going forward and of proof and persuasion in disparate-impact cases. These burdens are:

1. The Plaintiff must establish that a facially neutral employment practice has a discriminatory impact upon a protected class.

2. The Defendant-employer then has the burden of proving by the preponderance of the evidence that the neutral practice was a business necessity or job-related. A neutral practice is a business necessity and job-related if it bears "a manifest relationship to the employment in question."

3. When an employer establishes job-relatedness, the burden of proof then shifts to the employee to show the availability of other

selection devices with a lesser adverse impact which would serve the employer's needs, or to show that the employer was using the practice as a pretext for discrimination.

1. Plaintiff's Prima Facie Case

Plaintiff successfully established a prima facie case of discriminatory impact upon a protected class. As stated earlier, the evidence showed that twenty (20) blacks took the 1981 Fire Lieutenant (Combat) Examination, and only three (3) passed. To meet the requirements of the four-fifths rule of the EEOC guidelines, nine (9) blacks would have had to pass. With the prima facie case established, the burden of persuasion shifted to Defendant to prove by the preponderance of the evidence that the examination was a business necessity or was job-related.

2. Defendant's Burden

a. Business Necessity

When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the Court

may examine closely any employment selection practice that discriminates against minorities. Walker, 726 F.2d at 1558. However, when an employer establishes that the job in question requires a certain amount of skill to ensure that an unqualified applicant does not create unnecessary economic or human risks, the employer meets its burden of persuading the Court that the employment practice is a business necessity. Id. See Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), cert. denied 419 U.S. 122 (1975) (applicants for bus driver must be younger than 35 years old because accident rate increases as driver ages); Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (requirement that applicants for flight officer have at least 500 flight hours upheld because job requires high degree of skill and economic human risks are great).

The evidence produced at trial satisfies the Court that the public safety concerns presented in this case warrant strict promotional standards.

Defendant has an obligation to demand and pursue excellence in its Public Safety Department.

b. Relationship to the Job

After carefully considering the evidence, this Court must determine whether the 1981 examination administered for fire lieutenant (combat) was job-related. First, Defendant engaged in a lengthy, meticulous method of constructing the exam. The job functions required of a fire lieutenant (combat) were developed by individuals who not only had served in the position of fire lieutenant (combat) in the past, but also were now responsible for seeing that those who were, at present, fire lieutenants (combat) performed their jobs effectively. The make-up committee was composed of individuals intimately familiar with the work behaviors and knowledges necessary for the position of fire lieutenant (combat). Additionally, the questions were drawn to test those functions, or knowledges, from materials used to train fire lieutenants (combat).

Evidence that the examination was not job-related was noticebly lacking. Plaintiff's expert never correlated the test with successful job performance, but rather correlated the pass-fail rate of whites to blacks. This correlation certainly was evidence of the disproportionate impact of the examination, but was not evidence that rebutted Defendant's contention that the test was job-related. The test was developed by experts in the field from available materials directly related to job performance and to the knowledge required. Neither its administration, nor action taken upon the results, was designed, intended or used to discriminate on the basis of race.

This Court finds that the 1981 examination was "appropriate for the selection of qualified applicants for the job in question." Washington v. Davis, 426 U.S. 229, 247 (1976). Those who performed well on the examination would be expected to be the best-qualified for the position of fire lieutenant in combat because they demonstrated better knowledge of the

behaviors and knowledges required in such a position than those who scored poorly.

The above-conclusion suffices to refute statistical evidence that the test has a disproportionate racial impact. Washington, 426 U.S. at 246. This Court finds that Defendant successfully carried its burden of production. Therefore, Plaintiff had to show the availability of other selection devices with a lesser adverse impact, or show that the employer was using the practice as a pretext for discrimination.

3. Pretext for Discrimination or Other Selection Devices

In rebuttal to Defendant's evidence, Plaintiff presented only his own testimony. Plaintiff testified that he believed the Fire Department had discriminated against him as well as against seventeen (17) other blacks in its promotion procedures. Absolutely no evidence was presented that persuades this Court that Defendant's

employment practice, includes its promotional examination, is not worthy of credence.

Neither is the Court persuaded that other less discriminatory alternatives were available, but not used. To the contrary, evidence was submitted, albeit by the Defendant, that alternative methods historically were used and/or considered, but were not used in this case for legitimate reasons. In fact, in this Courts opinion, such alternative methods would have afforded Defendants more of an opportunity to discriminate against blacks.

For example, testimony was given about utilizing a performance examination. If a performance examination had been given, it would have necessitated the starting of one hundred twenty (120) fires so that each candidate could be rated on his ability to put out a fire. Such a rating procedure could lead to very subjective results, an end the objective exam was designed to prevent.

A second alternative selection procedure would have been to conduct an unassembled examination.

An unassembled examination entails the rating of candidates based on their education and experience. In this Court's opinion, such a candidate possesses a degree in firefighting, or has experience as a firefighter, does not automatically mean that the candidate possesses the knowledge necessary to the successful performance of fire lieutenant in combat.

Although testimony was given to show that composing an eligible list on a pass-fail basis rather than on a ranking basis would have had less adverse impact in terms of selection, the evidence clearly showed that such a change would have only slightly altered statistically the adverse impact of the examination.

Accordingly, this Court finds, based on the evidence submitted as a whole and the testimony presented to this Court at trial, that Plaintiff failed to sufficiently sustain his burden of persuasion under Title VII. Therefore, judgment is hereby entered in favor of Defendant, THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, and

against Plaintiff, WINSTON NASH, and the Defendant shall go hence without day.

DONE and ORDERED in Chambers at Jacksonville, Florida this 4th day of May, 1987.

s/ John H. Moore, II
UNITED STATES DISTRICT JUDGE

Copies to:

William Lee Allen, Esq.
Steven E. Rohan, Esq.

Opinion of the Eleventh Circuit,
Filed February 25, 1988

Winston NASH, Plaintiff-Appellant,

v.

The CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, a municipal corporation, Defendant-Appellee.

No. 87-3360.

United States Court of Appeals,
Eleventh Circuit.

Feb. 25, 1988.

Rehearing and Rehearing En Banc
Denied March 29, 1988.

Winston Nash, pro se.

William Lee Allen, Thomas E. Crowder, Steven E. Rohan, Asst. Counsel, Jacksonville, Fla., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before VANCE and HATCHETT, Circuit Judges, and OWENS *, Chief District Judge.

VANCE, Circuit Judge:

This case involves step two of the familiar three-step analysis for Title VII disparate impact claims. The district court found first that appellant had satisfied his initial

* Honorable Wilbur D. Owens, Jr., Chief U.S. District Judge for the Middle District of Georgia, sitting by designation.

burden of identifying an employment practice with a discriminatory impact. The district court next found that appellee had avoided a finding of discrimination against it by satisfying its burden of demonstrating that the practice was a business necessity and had a manifest relationship to the employment in question. Because we hold that appellee has not satisfied this burden, we reverse without considering the third step in the analysis. We remand the case to the district court for the sole purpose of granting relief to the plaintiff as instructed in this opinion.

I.

Appellant Winston Nash visits this court a second time. The first round of proceedings is set out in detail in *Nash v. City of Jacksonville*, 763 F.2d 1393 (11th Cir.1985). Appellant, a black fire engineer in the City of Jacksonville fire department, applied for a promotion to combat lieutenant in 1976, 1978 and 1981. The City requires a score of 70 or higher on the (combat) promotion examination in order to be considered for promotion. Appellant scored an 84 on the test in 1975 and was placed on the promotion eligibility list. The list expired, however, before the City promoted him. He scored 69 and 69.072 in his next two attempts, both below the cutoff score of 70.

The test was prepared by a committee of two fire chiefs and one captain. Although

the City states that supervisory ability is necessary for the position of combat lieutenant, the City admits that there are no questions on the examination relating to supervisory skills because such skills cannot be tested by written examination.[1] Only three of the twenty blacks who had taken the test at the time of the trial had passed (none was promoted), while 57 of the 100 whites who had taken the test had passed. Because this violates the EEOC's "four-fifths rule", *see* 29 C.F.R. § 1607.4(D),[2] and because appellant's expert produced additional statistical evidence, the district found that appellant had stated a prima facie case of discriminatory impact. *See Nash*, 763 F.2d at 1395.

The test questions themselves, however, never made their way into evidence. Neither appellant's expert witness nor the district court ever saw the questions. Appellant's expert concluded from indirect evidence that some of the test questions showed a disparate impact. Appellant's ex-

1. The development of the promotion examination is set out in detail in *Nash*, 763 F.2d at 1395–96.

2. 29 C.F.R. § 1607.4(D) provides in part:

> *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact....

pert also testified that, based on his statistical analysis, it was impossible to "even conclude that the examination selected people who best performed on the examination, much less who ... would best perform on the job." The only witness who actually reviewed the test questions was the City's former personnel examiner and current retirement pension manager, who also served as the City's expert at trial. He refuted the conclusions of appellant's expert on the grounds that it was necessary to consider the actual questions (which appellant's expert was not allowed to do) in order to determine whether or not the questions were job-related. The district court credited the City's evidence, discredited the testimony of appellant's expert, and ruled for the City. The court, still without ever seeing the examination, found that it was content-valid and job-related.[3]

On appeal this court subtly observed that "[h]ad the burden of persuasion as to 'content-validity' been placed where it should have been, on defendant, we think defendant might have felt it incumbent to produce the examination questions." 763 F.2d at 1398. This court then reversed the district court, "expressing] wonder that any court

3. The district court completed the third part of the analysis and found that there were no less discriminatory ways for the City to select fire engineers for promotion.

should attempt to determine whether a written examination was 'job-related' and 'content-valid' without having before it the questions asked of the applicants." *Id.* Our wonder has now ripened into full incredulity, because on remand the district court ruled again for appellee, still without ever seeing the test questions. This appeal therefore forces us to abandon subtlety in applying the law under Title VII to the facts of this case.

II.

[1] Once an employee has demonstrated that a facially neutral employment or promotion practice has a discriminatory impact, the burden shifts to the employer to demonstrate that the practice has a manifest relationship to the employment in question or is a business necessity. *See Connecticut v. Teal*, 457 U.S. 440, 446–47, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971); *Craig v. Alabama State Univ.*, 804 F.2d 682, 685 (11th Cir.1986); *Walker v. Jefferson County Home*, 726 F.2d 1554, 1558 (11th Cir.1984). If the employer meets this burden, the employee may still prevail by establishing that the employer used the practice as a mere pretext for discrimination. *Teal*, 457 U.S. at 447, 102 S.Ct. at 2530; *see Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53

L.Ed.2d 786 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); *Craig*, 804 F.2d at 685. If the employer fails to meet this burden then discrimination has been proved, and there is no need to examine pretext or to consider the existence of less discriminatory alternative practices. The employee is entitled to relief. *See Albemarle Paper*, 422 U.S. at 436, 95 S.Ct. at 2380; *Crawford v. Western Elec. Co., Inc.*, 745 F.2d 1373, 1386 (11th Cir.1984); *Walker*, 726 F.2d at 1559.

There is no dispute that the district court correctly found that appellant proved a prima facie case of discrimination. The district court found, however, that the City successfully carried its burden of proving that the promotion examination was job-related and a business necessity.[4] Under this burden the employer must show "that the challenged employment practice has a 'manifest relationship' to the employment in question, or in other words that it is supported by 'business necessity.'" *Craig*, 804 F.2d at 685 (citing *Griggs*, 401 U.S. at 431–32, 91 S.Ct. at 853–54).

4. At the first trial, the district court only required the City to "articulate" some legitimate, non-discriminating reason, rather than carry the burden of persuasion. This is contrary to the law of disparate impact cases. *See Nash*, 763 at 1397–98.

A.

The district court found that the test was job-related. This finding is reversible either if it is clearly erroneous or if the district court erroneously applied the law. *Nash*, 763 F.2d at 1396–97. The district court based its conclusion on the procedure used to construct the test and on the fact that appellant failed to produce evidence that the examination was not job-related. This conclusion, however, was based on both legal errors and clearly erroneous factual findings.

The district court first committed reversible error by repeating the same legal error it committed in its first ruling. In *Nash* this court instructed the district court that in Title VII disparate impact cases the burden is on the employer to prove job-relatedness. 763 F.2d at 1397. This court wrote that in an impact case the employer must do more than "articulate" non-discriminatory reasons for its employment practice. *Id.* This court noted that the district court repeatedly stated that the plaintiff "has failed to persuade the court 'by a preponderance of the evidence.' The idea seems to be that mere 'articulation' shifts the burden back to plaintiff to persuade that the test is discriminatory, but this is contrary to the authorities in this circuit as to 'impact' employment test cases...." *Id.* at 1398.

[2] On remand, the district court committed the same error. Finding the test job-related, the district court wrote in its

memorandum opinion: "Evidence that the examination was not job-related was noticeably lacking. Plaintiff's expert never correlated the test with successful job performance...." As we thought we had made clear, once the plaintiff made out his prima facie case of disparate impact, it was the defendant's burden to show that the test was job-related, not the plaintiff's burden to show the test was not job-related.

[3] The district court also committed reversible error by allowing the City's evidence of how the test was prepared to satisfy its burden of proving that the content of the test was related to job performance. Just because test questions are drafted by qualified city employees does not mean that the questions are job-related. Even qualified supervisory personnel can construct test questions very unrelated to job performance. The fact that the City presented evidence relating to how the test was constructed is not legally sufficient by itself to show the questions were job-related.

[4, 5] Job-related test questions are those that are "shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are evaluated.'" *Albemarle Paper*, 422 U.S. at 431, 95 S.Ct. at 2378 (quoting 29 C.F.R. § 1607.4(c)); *see Police*

Officers for Equal Rights v. City of Columbus, 644 F.Supp. 393, 414 (S.D.Ohio 1985). In this case the City presented no evidence at all that the test questions were job-related in any way. The City did not present the actual test questions and the City's expert testified that he did not evaluate the test questions as to whether or not they were job-related.[5] Job-relatedness can be established through the testimony of expert witnesses supported by a validation study. *See, e.g., Black Law Enforcement Officers Ass'n v. City of Akron*, 824 F.2d 475, 480–81 (6th Cir.1987); *Davis v. City of Dallas*, 777 F.2d 205, 209–10 (5th Cir.1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1972, 90 L.Ed.2d 656 (1986); *Gillespie v. Wisconsin*, 771 F.2d 1035, 1041–44 (7th Cir.1985), *cert. denied*, 474 U.S. 1083, 106 S.Ct. 854, 88 L.Ed.2d 894 (1986); *Contreras v. Los Angeles*, 656 F.2d 1267, 1280–84 (9th Cir.1981), *cert. denied*, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982); *Brunet*

5. The transcript of the trial reads:

Q (counsel for defendant): Did you evaluate the examination as to whether or not it related to job performance?

A (defendant's expert): As far as job performance, no.

The defendant's expert also testified that he was not familiar with the principles of validation and the use of personnel selection procedures set forth by the American Psychological Association. The EEOC's guidelines, 29 C.F.R. § 1607, are based on these guidelines. *Albemarle*, 422 U.S. at 430–31 & n. 29, 95 S.Ct. at 2378 & n. 29.

v. *City of Columbus*, 642 F.Supp. 1214, 1246–47 (S.D.Ohio 1986). In this case, however, there was no validation study conducted by an expert.[6] Without the test itself and with no testimony presented by

6. The City's personnel examiner assigned to the 1981 examination claims to have completed a content-validity study on the examination. There is no evidence, however, and the district made no finding, that the City's promotion test was validated under the EEOC guidelines. The EEOC guidelines, though not substantive regulations promulgated pursuant to procedures established by Congress, "are 'entitled to great deference.'" *Albemarle*, 422 U.S. at 431, 95 S.Ct. at 2378 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971)). Several courts have held that certain fire department examinations must be validated in conformity with the guidelines in order to prove job-relatedness. *See, e.g., Brunet*, 642 F.Supp. at 1245.

Appellant presented evidence that the City is in violation of several requirements for EEOC validation. *See, e.g.*, 29 C.F.R. §§ 1607.5(G), 1607.14(C)(9) (use of selection procedure on a ranking basis); *id.* at §§ 1607.5(H), 1607.15(C)(7) (use of ranking system and cutoff scores); *id.* at § 1607.15(C) (documentation of content validity); *id.* at § 1607.5(I) (use of selection procedures for promotion). In any event, we believe that an analysis of the job-relatedness of the City's test conducted by the City itself was not legally sufficient to carry the City's burden. *See Albemarle*, 422 U.S. at 433 n. 32, 95 S.Ct. at 2379 n. 32. The City's expert, who testified that he had not conducted a content-validity study, was also a City employee. Had he evaluated the job-relatedness of the test questions, his testimony would be subject to examination with great care. *Id.*

the defendant regarding the job-relatedness of the questions, there was no way for the district court to conclude that the questions were job-related.

The best evidence on job-relatedness of the questions came from the testimony of appellant's expert, who testified that from his statistical analysis of the test results and his study of the materials he received from the City, the test was "not capable of being validated, because there's too many items that cannot be validated."[7] Indeed the City admitted through the testimony of its current personnel examiner that the examination did not test the one aspect of job

7. The transcript of the trial reads:

Q (counsel for plaintiff): From your analysis of all the documentation and material that was supplied to you, ... what is your opinion concerning the validity of the selected procedure used? The test, in other words?

....

A (plaintiff's expert): From the documents that were given me, it appeared that there was no reason why one would think that they could have constructed a valid test, given the way they went about doing the job analysis. And given the fact that the test was constructed by listing reading material and selecting questions out of the reading material, rather than directly constructing the test to reflect the job, itself—and that was very clear in the materials, that that was the method of making the test--so that even at that point it appeared that what the test was, was some kind of quasi-academic hurdle. [The test did not] measur[e] performance on the job and us[e] performance on the job as the predictor of who had the most knowledge and information and ability and skill to perform the job....

performance that differentiated the job of firefighter engineer from fire lieutenant (combat): supervisory skills. An officer's job in a fire department involves "complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities—none of which is easily measured by a written, multiple choice test." *Firefighters Inst. for Racial Equality v. City of St. Louis*, 616 F.2d 350, 359 (8th Cir.1980), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981). It is a position "which involves tasks and characteristics which cannot be tested exclusively by such tests." *Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Serv.*, 625 F.Supp. 527, 547 (D.N.J.1985), *aff'd* 832 F.2d 811 (3d Cir.1987). The best that can be said of the City's test based on the evidence at trial was that it may have been valid with respect to reading materials provided to the applicants. This is immaterial, however, to whether the content of the questions related to the performance of the job. *See Vulcan Pioneers*, 832 F.2d at 815–16; *see also* 29 C.F.R. § 1607.14(C)(4) (a test that purports to sample work behavior should closely approximate the work situation). The district court's finding that the examination relates to job performance is therefore clearly erroneous.

B.

[6] The district court also found that the City's promotion examination was a business necessity. "The business necessity doctrine is 'very narrow,' and the employer bears the burden of not only articulating but also *proving* business necessity through the evidence." *Craig* 804 F.2d at 689 (quoting *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1389 (5th Cir.1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979)) (citation omitted) (emphasis in original). This court stated the test most recently in *Craig:*

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced or accomplish it equally well with lesser differential racial impact.

804 F.2d at 689 (quoting *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 245 (5th Cir.1974), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979)); *see Crawford*, 745 F.2d at 1384–85.

The district court found that the City had "an obligation to demand and pursue excellence in its Public Safety Department." While this statement is correct, it is not a basis for finding that the test at issue was a business necessity. The City's expert admitted that 27 of the 97 questions on the 1981 examination had an adverse impact on black applicants. Thus while the City has a business necessity in ensuring that it promotes only qualified firefighters to lieutenant, it has no business purpose at all for using an improper means to do so. The City presented no evidence on why a racially discriminatory test is a business necessity. *See Crawford*, 745 F.2d at 1385–86 (no business necessity for the mechanics of employer's employment practice, even though theoretically the practice related to safety and efficiency). The district court's finding that the test was a business necessity is therefore clearly erroneous.

III.

[7] We therefore reverse the district court's judgment for the City and hold that because the City failed to meet its burden appellant is entitled to judgment. Where the plaintiff has established a prima facie case, and the defendant fails to show the job-relatedness of an examination with discriminatory impact, the issues are not open for redetermination on remand. *Bunch v. Bullard*, 795 F.2d 384, 395 (5th Cir.1986);

see Crawford, 745 F.2d at 1386. We therefore remand the case to the district court for the entry of judgment on liability.

Plaintiff is entitled to the position of fire lieutenant (combat), with the seniority and benefits accorded a lieutenant as of the date the first lieutenant was selected for promotion from the eligibility list for the 1981 examination. We remand for judgment to that effect, for a determination of the amount of back pay and for such other relief as may be appropriate.

REVERSED and REMANDED with instructions.

Order of Denial of Petition for Rehearing
Filed March 29, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-3360

WINSTON NASH,

Plaintiff-Appellant,

versus

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, a municipal corporation,

Defendant-Appellee.

Appeal from the United States District Court for the

ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF REHEARING IN BANC

Opinion 2/25/88, 11 Cir., 198___, _____ F.2d _____)
(March 29, 1988)

Before VANCE and HATCHETT, Circuit Judges, and OWENS*, Chief District Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh

Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

s/ Robert S. Vance
United States Circuit Judge

*Hon. Wilbur D. Owens, Jr., Chief U.S. District Judge for the Middle District of Georgia, sitting by designation.

Defendant's Motion For Protective Order, Served October 14, 1983

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

vs. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY FLORIDA, a municipal corporation,

Defendant.

MOTION AND MEMORANDUM OF LAW FOR PROTECTIVE ORDER OR IN CAMERA INSPECTION OF THE FIREFIGHTERS LIEUTENANT COMBAT EXAM

Defendant moves the Court for entry of an order protecting disclosure of the Firefighters Lieutenant Combat Exam administered in November 1981, and says:

1. The contents of the exam are confidential. To divulge the contents of the exam to plaintiff will compromise the examination and render all questions thereon unusable.

2. In the consolidated cases of Coffee, et al. v. Braddy, et al. and Corley v. City of Jacksonville, Judge Scott conducted an in camera inspection of the Firefighters entrance examination from which he

made his determination. Such a procedure would be preferable to full disclosure of the exam and answers.

3. Defendant has conferred with opposing counsel and counsel has been unable to resolve the dispute.

Defendant therefore moves the Court for a Protective Order preventing the production of the Firefighters Lieutenant Combat Exam at the deposition of Darline Horne on October 17, 1983, or in the alternative an order for in camera inspection by the Court of the subject examination.

MEMORANDUM OF LAW

Kerr v. U.S. District Court, 426 U.S. 394 (1976).

Coffee, et al.v. Braddy, et al.,No. 71-44-Civ.J-S.

Corley v. City of Jacksonville, No. 80-383-Civ-J-S.

Respectfully submitted,

DAWSON A. McQUAIG
GENERAL COUNSEL

s/ Thomas E. Crowder
ASSISTANT COUNSEL
1300 City Hall
Jacksonville, Florida 32202
(904) 633-2460
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DEITRA MICKS, 5411 Soutel Drive, Jacksonville, Florida 32208, Attorney for Plaintiff, by mail, this 14th day of October, 1983.

s/ Thomas E. Crowder
Attorney

Order Granting Protective Order,
Filed November 1, 1983

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

vs. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY FLORIDA, a municipal corporation,

Defendant.

ORDER

Defendant's Motion and Memorandum of Law for Protective Order or in Camera Inspection of the Firefighters Lieutenant Combat Exam filed on October 14, 1983, is GRANTED as to the request for a protective order, no opposition thereto having been filed pursuant to rule 3.01(b), Local Rules, Middle District of Florida. Accordingly, Defendant is not required to produce the Firefighters Lieutenant Combat Exam at the deposition of Darline Horne.

DONE AND ORDERED at Jacksonville, Florida, this 1st day of November, 1983.

s/ Howard T. Snyder
HOWARD T. SNYDER
United States Magistrate

Copies to:

Deitra Micks, Esquire
5411 Soutel Drive
Jacksonville, Florida 32208

Bill Allen, Esquire
Thomas E. Crowder, Esquire
Assistant General Counsel
Office of General Counsel
1300 City Hall
Jacksonville, Florida 32202

Plaintiff's Motion For Further Relief, Filed June 24, 1986

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

v. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY FLORIDA, ETC.

Defendants.

PLAINTIFF'S MOTION FOR FURTHER RELIEF

Plaintiff, Winston Nash, through his undersigned counsel respectfully moves this Court pursuant to applicable Federal Rules of Civil and Appellate Procedure to render fact findings in accordance with the Judgment of Remand to this Court from the Eleventh Circuit in its opinion entered and issued as mandate dated July 17, 1985.

I HEREBY CERTIFY that a copy of the Motion for Further Relief has been mailed to the Office of

the General Counsel, 1300 City Hall, Jacksonville, Fla. 32202 this 24th day of June, 1986

s/ Deitra Micks
DEITRA MICKS Esquiress
Attorney for Plaintiff
5411 Soutel Drive
Jacksonville, Fla. 32208
(904) 764-5411

Defendant's Response To Plaintiff's Motion For Further Relief, Filed June 30, 1986

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

vs. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF JACKSONVILLE, ETC.

Defendant.

RESPONSE TO PLAINTIFF'S MOTION FOR FURTHER RELIEF

Defendant, Consolidated City of Jacksonville, in response to Plaintiff's Motion for Further Relief states as follows:

1. That Plaintiff's request for this Honorable Court to render an amended order complying with the Opinion of the Eleventh Circuit Court of Appeals is in fact an appropriate request to which the defendant has no objection.

2. As this Honorable Court (1) presently has the transcript of testimony and all exhibits from the last trial before it; (2) together with proposed finding of facts and conclusions of law by the parties;

and (3) the appellate court simply clarified the law to be applied regarding the correct burdens of production and persuasion; and (4) this cause was tried by the Court without a jury and each party was provided a full opportunity to present evidence; this Honorable Court is appropriately postured to consider the evidence presented in light of the appellate decision and issue an Amended Opinion and Final Judgment without further hearing or expense to the parties.

GERALD E. SCHNEIDER
GENERAL COUNSEL

s/ Steven E. Rohan
STEVEN E. ROHAN
ASSISTANT COUNSEL

1300 City Hall
Jacksonville, Florida 32202
(904) 633-2460

ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DEITRA MICKS, 5411 Soutel Drive, Jacksonville, Florida 32208, Attorney for Plaintiff, by mail, this 27th day of June, 1986.

s/ Steven E. Rohan
Attorney

**Order Requesting Proposals,
Filed June 30, 1986**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

vs. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY FLORIDA, etc.

Defendant.

ORDER

After a review of the file and Plaintiff's motion for further relief, filed June 26, 1986, the Court now

ORDERS and ADJUDGES:

That Plaintiff and Defendant shall file proposed findings of fact, with citations to the trial transcript, and conclusions of law, in accordance with the Eleventh Circuit's decision rendered June 25, 1985, within ten (10) days of the date of this Order.

DONE AND ORDERED in Chambers at Jacksonville, Florida this 30th day of June, 1986.

s/ John H. Moore, II
UNITED STATES DISTRICT JUDGE

Copies to:
All counsel of record

PERTINENT TRIAL TESTIMONY OF THE PLAINTIFF

"Q Isn't it fair to say that the -- each one of those publications that's on the reading list for the lieutenant's exam was in -- at one time or another included in the training that you received in the fire station?

"A Probably at one time or another." (R5-129)

***

"Q Were those questions on the examination about subjects that come up in the -- in your operation as a fire fighter?

"A Yes, they were." (R5-130)

***

"Q Any of that training that went on in the fire station come from these manuals that the -- the recommended reading for the fire lieutenant's exam?

"A They most certainly did; it most certainly did." (R5-132)

***

"THE COURT: What kind of special training do you feel that the fire department could have offered you that would have assisted you in passing that test?

"A I don't think that the Jacksonville Fire Department could have given me any special training whatsoever. It was -- the problem that I had and that I saw and that I have felt was the problem with the test was the wording. And just like I said once, that I felt that I did pass that test." (R5-135-136)

***

"THE COURT: Do you feel that that test had any more impact, adverse impact, on you than it would have on a white person who had a bachelor's degree and a master's degree similar to yours?

"A I don't think that it had -- no, I don't think it had an impact, a greater impact on me; no. (R5-136)

"THE COURT: Okay. Are you suggesting, or -- well, are you suggesting that in the grading

of that test they treated your paper any differently from that of a white person?

"A I'm -- I'm -- very close to that, Your Honor, very close to that, and I'm -- I'm very upset in respect to that." (R5-136)

***

"Q Did you tell them what particular areas of concern -- did you tell them what particular areas were of concern to you on the examination?

"A I felt like the whole test was -- it was -- it was not the same type of test that I had been exposed to that I felt was fair. It was a very difficult test and although it was difficult, I -- just like I said, I felt like I made in the nineties and I ended up with a 69.

"Q How was it difficult?

"A The wording and the questions, it was -- if one word was omitted or one word added, that's the type of situation that I remember from. It's been two -- two years and some change, and it's very difficult to pinpoint any section or any one thing, but that is the one thing that I do remember, specifically, the

fact that the wording was very bad, very bad." (R5-123)

***

"Q Do you think if the tests were validated that you could pass?

"A Of course; it would be no problem.

May I add something to -- the situation, in fire fighting, what I feel is applicable to a supervisor in the Jacksonville Fire Department, anybody can serve as a supervisor in the Jacksonville Fire Department. We all come on the fire department and we learn in the training school how to fight fire, and you have to be able to fight fire to survive the year, in order to survive the first year of probation. And to survive with a reputation as being a good firefighter for eleven years is incredible. . . ." (R5-124)

"Q All the questions on it were job related; right?

"A I can't say that those questions were job related. The questions themselves posed a problem, not the fact that the -- the material was job related. I'm positive the material was job related.

"Q Mr. Nash, may I remind you that on direct examination in your testimony at the beginning of this trial, that you did make the statement that all the questions were job related?

"A If I said that I meant it just like I just said it, that the material that was given was job related. I'm sure the questions were aimed at job relatedness, but they missed the point.

"Q All the questions came from the study material?

"A As far as I know, yes, they did.

"Q There was no discrimination to you that would be any different than to a white male who had the same qualifications as you; is that correct?

"A Now, that's a very difficult question. As applies to this test?

"Q That's what we're talking about, is this test, yes, sir.

"A Would you repeat that.

"Q I said is there -- there is no discrimination that would apply to you that wouldn't apply to a white male with the same qualifications; is that correct?

"A I'm -- probably so, because it did -- the test did discriminate against the sixty that didn't pass.

"Q But the question here is did it discriminate against you, sir?

"A Yes, because I didn't pass the test. I studied for six months, six hours a day.

"Q Automatically it discriminated against you because you didn't pass it?

"A No, that's -- it didn't automatically discriminate against me. It was a very bad test (R6 104-105).

PERTINENT TRIAL TESTIMONY OF DARLENE HORNE

"A We did a content valid study on this examination.

"Q All right. And why did you do the content validity study or content valid study?

"A Why did we do the content valid study?

"Q As opposed to the criterion.

"A As opposed to criterion study as such? If -- a criterion study means that when you use a selection procedure you have to relate that to their performance on the job also. That could take years to perform.

The other one, construct, involves personality traits, and we have never done that at the City.

"Q And what did you do and how did you proceed in doing the content validity study? What were the procedures?

"A Okay. Content validity, you either test for a work behavior -- if you do not test for the work behavior you test for knowledges that are the

prerequisite to do that work behavior, and that is what we did.

"Q Okay. And how did you determine those important aspects?" (R6-25-26)

***

"A . . . The work behaviors that we came up with, we came up with five work behaviors that were significant for this job. We rated them and then we came up with a list of knowledges that were required to do these work behaviors, and we also rated the knowledges." (R6-26)

***

"Q And I think you have previously testified as to the results of that examination, so we won't go into that.

Now, how was the job analyzed or reviewed?

"A The job experts. How was it analyzed?

"Q Yes.

"A They gave us --

"Q Okay. Go ahead.

"A They gave us all the work behaviors, the knowledge, skills and abilities to do the job. Of course we rated those, and then the job analysts came in and told the job experts also to look at the job specification for fire lieutenant combat to make sure that it was up-to-date." (R6-27)

***

"Q What kind of a review did you do on the examination as to the job analysis or the job review, if you will?

"A Okay. The job review done by the job analyst at the time or the job analysis during the complete exam development?

"Q The exam development.

"A The exam development job. I made sure that our procedures were abided by by our committee and that they stuck to our procedures that -- for instance, when they were writing the examination development questions, that they wrote only questions that were needed to perform as a fire lieutenant in the combat section.

"Q Did you give them general direction or were you present when they prepared the examination?

"A I was present." (R6-30)

* * *

"Q And how was this selection procedure that was used related to the job of fire lieutenant?

"A Well, it was testing for the knowledges that were needed to perform the work behaviors of the job." (R6-31)

* * *

"Q Now, isn't it a fact that you and your committee obtained the work behavior analysis -- that you obtained the work behaviors from the job descriptions?

"A No, it's not.

"Q Did you all do a formal investigation of the job content for fire lieutenants?

"A With my committee I did, yes." (R6-36)

* * *

"Q My question is, how was this work -- well, wasn't this work behavior obtained from the job description of fire captain?

"A No, it was not. This work behavior was taken from the job experts that I work with for this examination and this is what they told me that a fire lieutenant in combat would do. I at no time conversed with them about a fire captain nor did I have job specifications for a fire captain." (R6-37)

PERTINENT TRIAL TESTIMONY OF JOHN BROXSON

"Q Before you got around to making up the questions, what did you do as a member of the testing committee?

"A We evaluated the position. I assume that's what you would call it.

"Q I show you Plaintiff's Exhibit Number 19, specifically, the work behavior analysis work sheet, and ask you if you have ever seen that?

"A Yes, sir, this is the work analysis work sheet we worked up on the job.

"Q And how did you go about developing that work sheet, sir?

"A Well, myself and Chief Chalker and Chief Pelham, the other two members on the committee, we talked about the job and what they did and broke it down to what we have here for a work sheet.

"Q What they did, you mean fire lieutenant?

"A Yes, sir, position." (R6-44)

* * *

"Q The -- how did this information of the items -- the questions that you came up with, how did that relate specifically to the job of fire lieutenant? How did you determine these would be the questions that would be asked?

"A We took the material and read through it and went through it, made up questions and then talked about it, and if we thought -- all three of us thought it was, you know, a good valid question, then it was applied to the test; then I assume personnel took it and certified it." (R6-48)

* * *

"Q Now, how did you -- what background or what did you use to determine that these were the most particular aspects of the fire lieutenants job? What did you rely upon for that?

"A These aspects we just made the questions on?

"Q Yes.

"A Well, through my knowledge, I haven't -- I've been on -- captain for four years and Chief Pelham and Chief Chalker and all that, they would have

probably I think a total of maybe forty-five, fifty years of fire fighting. We determined that these were the job of the fire lieutenant, and he would need these to -- need to know these to become a lieutenant." (R6-51-52)

* * *

"Q In doing the work behavior analysis, the original pages that you did there, were not those work behavior analyses related to the primary requirements of the job of fire lieutenant?

"A Yes, sir." (R6-65)

(2)

No. 87-1954

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

THE CONSOLIDATED CITY OF JACKSONVILLE,
DUVAL COUNTY, FLORIDA,
A MUNICIPAL CORPORATION,

Petitioner,

v.

WINSTON F. NASH,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

As the opinion by the Eleventh Circuit does not conflict with any opinion of this Court, or with any opinion of another circuit court, the Petition for Writ of Certiorari should be denied. The Eleventh Circuit correctly decided for Nash, based on at least six substantial legal findings. Further, the City of Jacksonville failed to provide any evidence that it had administered a valid examination thus, did not refute Respondents Prima Facie case.

———o———

ARGUMENT

I. THE ELEVENTH CIRCUIT COURT'S OPINION DOES NOT RAISE A CONFLICT CONCERNING THE BURDEN OF PRODUCTION STANDARDS SET FORTH BY THE THIRD CIRCUIT.

The city failed to produce any evidence that the 1981 promotional examination for fire lieutenant combat was job related, or content valid. Further, the city in fact succeeded in keeping the examination questions from the trial proceedings. The city's examination construction methods did not meet any of the standards set by 29 C.F.R. 1607, which outlines the steps that should be taken. Instead, the Petitioner used an in house, make-up-as-you-go system that was totally discriminatory. Then, attempted to name the proceess after accepted standards.

No conflict exists between the opinion reached by the Eleventh Circuit and the opinion of the Third Circuit. These cases are of different facts and standards of law,

which show no resemblance, and represent no conflict. The only conflict is contained in Petitioners misinterpretation of case law.

The City refused to allow the examination questions to be admitted as evidence, then attempted to rely on that lack of evidence as a defense. Further, the Petitioner repeatedly argues that Nash admits the examination was job related. No such statement is on record. What's more, no fire fighting personnel are qualified to determine job relatedness of any examination. That is for experts to establish. The City's expert testified that he could not determine the job-relatedness of the 1981 examination. The City's own personnel examiner also testified at trial that they did not attempt to test applicants on supervisory knowledge skills, or abilities. Thus, the examination made no sense. The only difference between Nash's job assignment and that of lieutenant is the additional supervisory duties assigned to lieutenant. The promotional process in this case was fatally flawed from the beginning.

The Petitioner has attempted to manufacture a conflict where none exist.

II. THE ELEVENTH CIRCUIT OPINION DID NOT VIOLATE THE CLEARLY ERRONEOUS STANDARD, BY ITS FINDINGS REGARDING JOB RELATEDNESS.

The Eleventh Circuit correctly found in its review of the case that no evidence existed as a fact in the record to show that the examination was job related according to the minimum standards of 29 C.F.R. 1607. It is very clear that the city's solitary explanation of how it composed the examination was not legally sufficient to refute

Respondent's Prima Facie evidence presented in the case. The City's expert witness testified at trial that he did not test the aspect of the examination that correlated job performance with test scores. Thus, a conclusion that the examination was job related was clearly erroneous. The Eleventh Circuit was correct in its findings that the Trial Court decision was clearly erroneous.

III. THE ELEVENTH CIRCUIT DID NOT ERR IN ITS DECISION ON THE ISSUE OF EVIDENCE THAT IT CONSIDERED.

The City placed itself in a position outside of accepted standards for examinations outlined in 29 C.F.R. 1607, then refuse to submit the examination as evidence, alleging possible breach of secrecy two years after the examination was given. Further, the city in practically the same breath, testifies how it composes new examinations each time vacancies occur thus, discrediting its secrecy claim. This contradiction further demonstrates the nature of the City's conduct, violating the law on one hand, then turning all of its legal resources against the Respondent in defense of these violations on the other.

IV. THE ELEVENTH CIRCUIT WAS WARRANTED IN ITS RULING CONCERNING THE REMEDY IN THIS CASE.

Evidence was submitted at trial that Nash had served as lieutenant numerous times as required by rules and regulation of the Jacksonville Fire Department, and was monetarily compensated for those assignments. Nash passed the examination in 1976, with a final score of 84. Further, evidence was given that Respondent has earned, a Master's degree in Management and Supervision, a Bachelor's degree in Business Administration and an As-

sociate Arts degree in Fire Science. All of which exceeds the credentials of the highest ranking officials in the Fire Department. At trial, testimony was given that the top ranking supervisors are appointed without any examination what-so-ever.

Petitioner argues that the Trial Court should be afforded an opportunity to balance equities. Respondent simple states that the Trial Court had several opportunities to balance equities. According to the Eleventh Circuit, the Trial Court did not balance equities according to standards of law.

The City of Jacksonville is asking that it be excused from its burden as an employer and litigant. When historically, the record shows that fairness and compliance with law is lacking in administration of the City's promotional process.

———o———

CONCLUSION

As the Eleventh Circuit properly recognized, relief was due in this case to Respondent based on at least six important legal issues which are included in its opinion. This Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

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CLERK

NO. 87-1954

IN THE
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October Term, 1987

THE CONSOLIDATED CITY
OF JACKSONVILLE,
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a municipal corporation,

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WINSTON NASH,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTIONS ADDRESSED IN THIS SUPPLEMENTAL BRIEF

1. Whether the Eleventh Circuit's imposition of a burden of persuasion upon the employer, in a Title VII "disparate impact" case, conflicts with the proper burden of production standard set forth by the Third Circuit in *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3rd Cir. 1981), and a plurality of this Court in *Watson v. Fort Worth Bank and Trust*, 487 U.S. __, 101 L. Ed. 2d 827, 108 S.Ct. __ (1988)?

3. Whether the Eleventh Circuit erred when it limited the type of evidence it considered to be legally sufficient to prove job-relatedness?

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NO. 87-1954

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THE CONSOLIDATED CITY
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Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FILING STATEMENT

This Supplemental Brief is filed pursuant to Rule 22.6 of the Rules of the United States Supreme Court and directs the Court's attention to its recent decision in *Watson v. Fort Worth Bank and Trust*, 487 U.S. ____, 101 L.Ed.2d 827, 108 S.Ct.____(1988), which squarely addresses the first and third issues raised in the Petitioner's pending Petition for Writ of Certiorari. The Court decided *Watson* on June 29,

1988, subsequent to Petitioner's filing of its Petition for Writ of Certiorari on May 27, 1988.

All references to *Nash v. Consolidated City of Jacksonville,* 763 F.2d 1393 (11th Cir. 1985), will be as *Nash I.* All references to *Nash v. Consolidated City of Jacksonville,* 837 F.2d 1534 (11th Cir. 1988), will be as *Nash II.*

REASONS FOR GRANTING CERTIORARI

I

THE ELEVENTH CIRCUIT'S IMPOSITION OF A BURDEN OF PERSUASION UPON THE EMPLOYER CONFLICTS WITH THE BURDEN OF PRODUCTION STANDARD SET FORTH BY THE THIRD CIRCUIT AND THE SUPREME COURT IN *WATSON V. FORT WORTH BANK AND TRUST.*

In an unanimous decision, in *Watson v. Fort Worth Bank and Trust*, 487 U.S. ____,101 L.Ed. 827, 108 S.Ct.____ (1988), this Court expanded the application of disparate impact analysis to subjective employment criteria. A significant supplemental consequence of the *Watson* decision is that a plurality of this Honorable Court specifically determined that the burden of persuasion never shifts to an employer in disparate impact analysis. The reasoning advanced by the *Watson* plurality is similar to the position set forth in the City's petition in support of a grant of certiorari. The plurality concluded:

> "Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the

> basis of less evidence than is required to prove intentional discrimination."

Watson, 101 L.Ed.2d 827, 840.

The City cited in its petition the Third Circuit's reasoning, in *NAACP v. Medical Center, Inc.*, 675 F.2d 1322, 1335, which criticized as "illogical" an interpretation, as stated by the Eleventh Circuit in *Nash*, imposing a stricter standard upon an employer in the disparate impact cause of action than in the intentional discrimination Title VII cases. See City's Petition for Writ of Certiorari at page 12-13. If the Eleventh Circuit had followed the Third Circuit's rationale (which was effectively approved by the *Watson* plurality) and had applied the proper burden of persuasion in both *Nash I and II*, then the judgments of the District Court would have been affirmed and the City would have correctly prevailed.

The *Watson* plurality reaffirmed the previous holdings of this Court, that while the factual issues in disparate impact cases differ from the disparate treatment context, the ultimate legal issue of discrimination is not distinguishable in any of the

Title VII cause of actions. Furthermore, the ultimate burden to prove discrimination does not shift from the employee:

> ". . . Although we have said that an employer has 'the burden of showing that any given requirement must have a manifest relationship to the employment in question,' *Griggs*, 401 U.S., at 432, such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."

Watson, 101 L.Ed.2d 827, 847.

The Eleventh Circuit's holdings in both *Nash I* and *II* are explicitly to the contrary. The Eleventh Circuit, in the case at bar, improperly shifted the burden of proof to the employer on the ultimate issue of discrimination:

> ". . . But this is not the rule of the above cases, or any others, in an 'impact' situation involving employment tests under Title VII. It is the rule in intent cases only. The Court in *Burdine*, 450 U.S. at 252 n. 5,

> 101 S.Ct. at 1093 at n. 5, expressly distinguishes the 'impact' situation. In an 'impact' case the employer must do more than 'articulate'. He bears the burden of proving or 'persuasion', that the examination was a 'business necessity'. (citations omitted)
>
> "The idea seems to be that mere 'articulation' shifts the burden back to plaintiff to persuade that the test is discriminatory, but this is contrary to the authorities in this circuit as to 'impact' employment test cases that we have cited."

Nash I, 763 F.2d 1393, 1397-1398.

After a prima facie case of disparate impact is made, the plurality in *Watson* requires the employer to meet this burden by producing evidence that its employment practices are based on legitimate business reasons. The employee's obligation to persuade the court of the ultimate fact of discrimination does not shift.

The District Court below twice found the City had met this production threshold. Most importantly, in *Nash I*, even the Eleventh Circuit found the City had produced evidence of legitimate

business reasons:[1]

> "It is true that defendant, in its testimony, went much beyond mere 'articulation,' and the court recited this testimony with every indication of believing it . . ."

Nash I, 763 F. 2d 1393, at 1397.

Nevertheless, after *Nash* established his prima facie showing of disparate impact, the Eleventh Circuit, in both *Nash I* and *II*, erroneously shifted the burden of persuasion to the City.

Once the employer has met its burden of producing evidence, the *Watson* plurality held that the Plaintiff is required to show that other selection devices would produce less impact while serving the legitimate business interests of the employer. A plaintiff can also prove that the neutral selection criteria was not manifestly related to the job. These are weight and credibility determinations for the trial court.

---

1 The Eleventh Circuit in *Nash II* surprisingly rejected the legal sufficiency of the evidence which was the identical evidence as in *Nash I*. After *Nash I*, Nash did not move for a trial *de novo* and the evidence from the original trial was submitted to the Trial Court for further judgment. See Appendix to Petition for Writ of Certiorari at A-60, 62, 65.

In *Nash II*, the District Court specifically found that Nash had not sufficiently rebutted the City's production of legitimate business reasons:

> "Neither is the Court persuaded that other less discriminatory alternatives were available, but not used. To the contrary, evidence was submitted, albeit by the Defendant, that alternative methods historically were used and/or considered, but were not used in this case for legitimate reasons. In fact, in this courts [sic] opinion, such alternative methods would have afforded Defendants more of an opportunity to discriminate against blacks."

See Appendix to Petition for Writ of Certiorari at A-35. Therefore, the City would have prevailed on appeal if the correct burden of persuasion had been used.

In *Watson*, the plurality intended to explicitly enunciate the appropriate evidentiary guidelines applicable to disparate impact cases. The *Watson* plurality concluded that the high standards of proof applicable in the facially neutral context would guard against an employer's use of arbitrary

quotas to shield itself from potential unfounded discrimination claims. The plurality declared:

> ". . . In sum, the high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment."

Watson, 101 L.Ed.2d 827, 848.

The *Watson* Court's minority disagreed with the plurality's interpretation and held that a more stringent burden is applicable in a facially neutral context than in an intentional discrimination case. Justice Kennedy did not take part in *Watson* and Justice Stevens deferred discussion concerning the appropriate evidentiary standards until such facts are before the Court. The granting of certiorari herein would provide this Honorable Court with the opportunity to freshly announce the proper allocations of proof and provide the lower courts with further guidance on this issue.

The City of Jacksonville respectfully requests that this Honorable Court grant certiorari in view of

the plurality's opinion in *Watson* setting forth evidentiary standards in disparate impact cases in which are contrary to the Eleventh Circuit's decisions below.

III

THE ELEVENTH CIRCUIT ERRED WHEN IT LIMITED THE TYPE OF EVIDENCE IT CONSIDERED TO BE LEGALLY SUFFICIENT TO PROVE JOB-RELATEDNESS.

In *Watson*, the plurality reviewed the type of evidence legally sufficient to support a finding of an examination's job-relatedness. The restrictive approach taken by the Eleventh Circuit in *Nash* contrasts with the *Watson* plurality's view. The plurality reiterated the broad evidentiary alternatives available to the employer and specifically held:

> "Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance."

Watson, 101 L.Ed.2d 827, 847.

In *Nash II*, the Eleventh Circuit erroneously concluded that the evidence introduced at trial, which included the test formation methodology coupled with Nash's admissions of job-relatedness, was legally insufficient to establish job-relatedness

and to rebut a showing of disparate impact.[2] The Eleventh Circuit's ruling below is contrary to the *Watson* opinion quoted above:

> "Job-relatedness can be established through the testimony of expert *witnesses supported* by a *validation study*. (citations omitted) In this case, however, there was no validation study conducted by an expert. *Without the test itself* and with *no testimony presented by the defendant regarding job-relatedness of the questions*, there was no way for the district court to conclude that the questions were job related." (emphasis added)

Nash II, 837 F.2d 1534, 1537-1538.

The plurality in *Watson* further reaffirmed the principle that employers do not have to demonstrate that their objective tests predict ability

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[2] This contradicted the Eleventh Circuit's own holding in *Nash I* wherein they found the City *had* produced sufficient evidence of legitimate business reasons. *Nash I*, 763 F.2d 1393, 1397. Again, the *identical* evidence was before the Eleventh Circuit in both *Nash I and II*. See Appendix to Petition for Writ of Certiorari at A-60,62,65. Thus, the unavoidable inference to be drawn is that the Eleventh Circuit reweighed the evidence in violation of the clearly erroneous standard. See City's Petition for Writ of Certiorari, Pages 14-21.

to perform on the job. In support of this point, the plurality cited *Washington v. Davis*, 462 U.S. 229, 250, wherein this Court held the job-relatedness requirement was satisfied when the employer showed that an examination was related to success at a police training academy without a demonstration the test would predict future job performance.

The District Court, in *Nash II*, concluded that the examination, developed by qualified experts with past and current fire lieutenant experience and taken from relevant materials used to train fire lieutenants, was directly related to job performance in accordance with this Honorable Court's decisions. The District Court specifically found:

> "The test was developed by experts in the field from available materials directly related to job performance and to the knowledge required. Neither its administration, nor action taken upon the results, was designed, intended or used to discriminate on the basis of race.
>
> "This Court finds that the 1981 examination was 'appropriate for the selection of qualified applicants for

> the job in question'. *Washington v. Davis*, 426 U.S. 229, 247 (1976).*

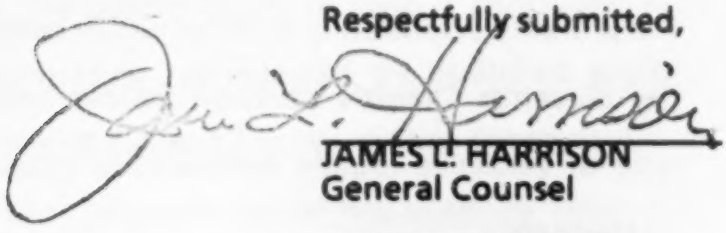
See Appendix to Petition for Writ of Certiorari at A-33. Therefore, the City would have prevailed on appeal if the correct interpretation of the type of evidence necessary to establish job-relatedness had been used.

The City of Jacksonville respectfully requests that this Honorable Court grant certiorari in view of the plurality's opinion in *Watson* which conflicts with the Eleventh Circuit's decision below limiting the type of evidence legally sufficient to establish job-relatedness.

CONCLUSION

For all the above and foregoing reasons, Petitioner prays that this Court grant a Petition for a Writ of Certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in *Nash v. Consolidated City of Jacksonville, supra*.

Respectfully submitted,



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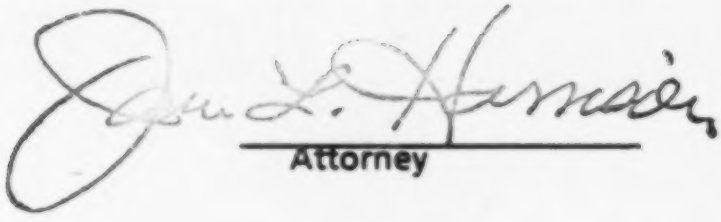
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies hereof have been furnished to WINSTON NASH, Respondent herein, 7948 Jeff Drive, Jacksonville, FL 32244, by United States mail, this 28th day of September, 1988.



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